IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1918

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

PPG INDUSTRIES, INC. AND CONOCO, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN OPPOSITION FOR RESPONDENT PPG INDUSTRIES, INC.

Of Counsel:

CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

STOCKWELL, SIEVERT, VICCELLIO, CLEMENTS & SHADDOCK
One Lakeside Plaza
Lake Charles, Louisiana 70601

CHARLES F. LETTOW
JANET L. WELLER
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

V. PETER WYNNE, JR.
One Gateway Center
Pittsburgh, Pennsylvania 15222

OLIVER P. STOCKWELL
One Lakeside Plaza
Lake Charles, Louisiana 70601

Counsel for Respondent PPG Industries, Inc.

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Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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MEMORANDUM IN OPPOSITION FOR RESPONDENT PPG INDUSTRIES, INC.

INTRODUCTION

Respondent PPG Industries, Inc. opposes the petition for writ of certiorari.

QUESTION PRESENTED

Does Section 307(b)(1) of the Clean Air Act, as amended especially by the Clean Air Act Amendments of 1977, 42 U.S.C. §7607(b)(1), confer original and exclusive jurisdiction on the courts of appeals to review final actions by the Administrator of EPA applying new source performance standards to particular facilities?

SUPPLEMENTAL STATEMENT OF THE CASE[1]

The case and the petition turn on amendments adopted in 1977 to the judicial review provisions of the Clean Air Act.

The petition for a writ of certiorari seeks review in this Court of the decision and judgment of the court of appeals dismissing a protective petition for review on jurisdictional grounds. *PPG Industries, Inc. v. Harrison*, 587 F.2d 237 (5th Cir. 1979) (Petition App. 1a). The protective petition for review related to a determination by the Environmental Protection Agency ("EPA") that the Agency's new source performance standards for air emissions from fossil-fuel fired steam generating units[2] applied to "waste heat" boilers making up part of a power plant at a chemical manufacturing works owned and operated by PPG Industries, Inc. ("PPG") at Lake

[1] Several abbreviations are used in this memorandum. "App." refers to the administrative record as reproduced in the Joint Deferred Appendix to the Briefs filed with the court of appeals. "Petition App." and "Petition Appendix" refer to the appendices to the petition for a writ of certiorari.

[2] See 40 C.F.R. §§60.1-60.15 and 60.40-60.46 (1978).

Charles, Louisiana. PPG had filed the protective petition for review in the court of appeals because of uncertainty over whether the provisions for judicial review of agency action in the Clean Air Act, as amended ("the Act"), 42 U.S.C. §§7401 *et seq.*, prescribed that initial review be had in the courts of appeals or in district courts. PPG concurrently filed a complaint in the U.S. District Court for the Western District of Louisiana alleging that EPA's determination was invalid and praying for a declaration to that effect along with an injunction against the Agency's enforcement of its determination. *PPG Industries, Inc. v. Costle*, Civ. Action No. 77-1271 (W.D. La., filed November 11, 1977).

Facts are important to this litigation. An understanding of the unexpected developments that produced this litigation is necessary to place the jurisdictional issue in context. In particular, the facts of this case demonstrate the ready applicability of the rationale of the court of appeals on the jurisdictional issue. Moreover, one of the grounds presented in this response for denial of the petition for certiorari rests upon the timing of and manner in which EPA made its determinations.

PPG was surprised when in early 1976 EPA began to consider whether new source standards should be applied to part of an integrated power plant that PPG had begun constructing in 1970. Nothing in the standards for fossil-fuel fired steam generators proposed on August 17, 1971, and later issued in due course, gave PPG notice that the standards might be applied to "waste heat" boilers, where the exhaust emissions from the boilers result in large part from the combustion of fossil fuel not in the boilers, but in associated gas turbines. And subsequently, when EPA did decide that its standards for fossil-fuel fired steam generating units

applied to the waste-heat boilers, it did not apply (and as a technological matter could not have applied) those standards as promulgated. Rather it developed requirements on an *ad hoc* basis, imposing, among other things, fuel limitations, despite the absence in the standard of any such limitations.

These are the basic factual circumstances in light of which EPA asserts its stance on jurisdiction. That stance in and of itself is startling because, during Congress's consideration of the bills which became the Clean Air Act Amendments of 1977,[3] no one involved with the legislative process gave any indication that a substantial shift of the forum for judicial review of EPA's actions from district courts to courts of appeals was even under consideration, let alone embodied in the bills.

Accordingly, this supplemental statement of the case will endeavor to provide a comprehensible description of the facility involved and also the manner in which EPA set about making its administrative determination. The following factual background for the jurisdictional issue particularly relates to two salient sets of facts and circumstances which were omitted in EPA's statement of the case and which are thus set forth in some detail.

1. PPG's power plant at the Lake Charles Works consists of a single integrated unit relying on both types of "cogeneration" technology to make highly efficient use of energy.

[3] See the discussion by the court of appeals at 587 F.2d at 243, Petition App. 12a-13a, of the revisions made to Section 307(b)(1) of the Act, as amended, 42 U.S.C. §7607(b)(1), by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (August 7, 1977).

EPA's petition recites that PPG's power plant at the Lake Charles Works uses "a coordinated system of two gas turbine generators combined with two 'waste heat' boilers." (Petition, at 4 (footnote omitted).) This characterization omits any reference to the fact that the power plant also contains a steam turbogenerator as part of the integrated unit. As the court of appeals recognized, the steam turbogenerator allows the power plant to use both the "topping cycle" method of cogeneration and a variant of the "bottoming cycle" mode:[4]

> To meet its energy requirements, PPG recently constructed a power plant designed to take advantage of fuel-efficient "cogeneration" technology. The power plant is comprised of two similar units. In each unit fossil fuel is burned in a General Electric gas turbine generator to produce electricity. Energy, or "waste heat" thrown off by the turbine's exhaust, which would normally be discharged into the atmosphere, is funnelled as a heat source into a "waste heat" boiler which also burns fuel oil. This exhaust from the turbines contributes nearly 40% (approximately 371 million British thermal units per hour) of the total input to the waste heat boiler, while the remaining heat (approximately 598 million British thermal units per hour) is provided by combustion of fuel oil or natural gas, known as fossil fuels. The highly pressurized steam produced by the waste heat boiler is first used to turn a "backpressure" turbogenerator, thereby creating more electricity, and is then channelled into PPG's main plant for use in the manufacturing process. (587 F.2d at 238-239, Petition App. 2a-3a.)

[4] As EPA's petition recognizes, the term "cogeneration" is used to denote energy-efficient production both of electricity and of process steam at one power plant. (Petition, at 4 n.1.)

This dual use has an important bearing on the factual underpinnings of EPA's decision to apply its new source standards for fossil-fuel fired steam generating units to the waste-heat boilers in the system.

Cogeneration systems are not, unfortunately, in common use in this country.[5] When they are used, reliance is ordinarily placed on only one or the other of the two modes, not both together. In layman's terms, the two cogeneration modes have been described as follows:

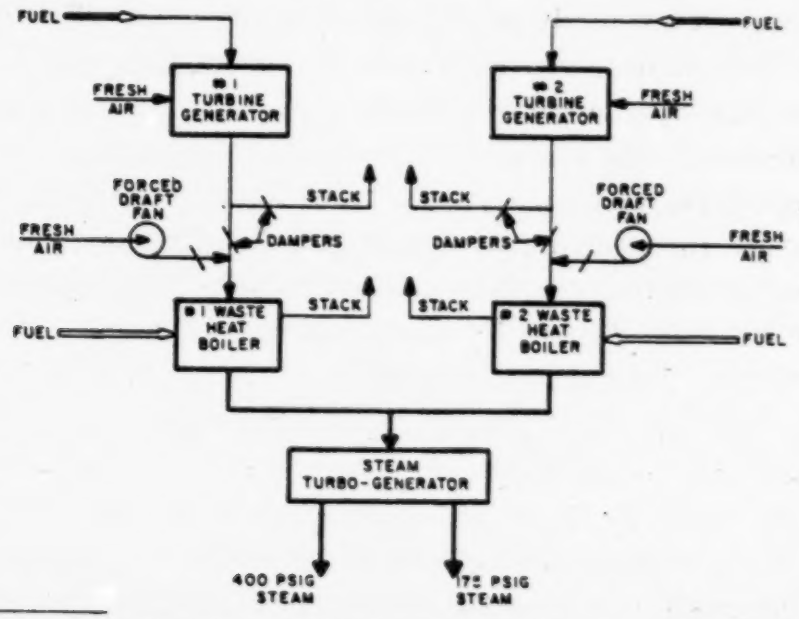
> In . . . [the 'topping-cycle'] approach to cogeneration, turbogenerators create electricity from the steam before it is used for drying and other low-temperature industrial processes. In 'bottoming cycle' operations, generators produce electricity from exhaust heat after the heat is first used for some higher-temperature processing job, such as smelting or kiln baking.
>
> (*Business Week*, June 6, 1977, at 99; Attachment A to Petitioner's Reply Brief in the court of appeals.)

Considered on a flow-chart basis (a diagram of the system is shown below) PPG s cogeneration system initially relies on a *reverse* "bottoming cycle" mode. That is, the gas turbines produce electricity from combustion of natural gas.[6] Then the waste-heat boilers use the heat in the exhaust gases from the turbines, plus heat from firing supplemental fuel, to generate high-temper-

[5] Remarks of President Carter to a Joint Session of Congress, White House Press Release, at 5 (April 20, 1977). (App. 81.)

[6] The General Electric gas turbines are also capable of using oil of certain specifications as fuel.

ature, high-pressure steam.[7] The high-temperature, high-pressure steam produced by the waste-heat boilers is supplied to the steam turbogenerator to make electricity (the "topping cycle" approach), and the resultant low-temperature, reduced-pressure steam is used in chemical processing operations at the Lake Charles Works.[8]



[7] The waste-heat boilers have been designed and constructed to use as supplemental fuel either natural gas, fuel oil, or hydrogen.

[8] The electricity produced by the system is used at the facility for, among other things, the production of chlorine and caustic from brine.

As the description of the power plant in the opinion of the court of appeals (quoted *supra*, at 5) suggests, the integrated unit is sizeable. It is rated at a total capacity of 180 megawatts of electricity and 1.35 billion BTU/hour of steam. (App. 15.) The General Electric Gas turbines are the largest model then manufactured by the company.

The savings in energy attributable to the cogeneration aspects of the system are equal to 1 million barrels of oil per year, or 42 million gallons of oil per year.

In short, the system has been carefully designed to make highly efficient use of the fuel energy supplied to it. Each component of the system serves an essential purpose. PPG first made this point to EPA when it provided EPA with information bearing on the date construction of the system would be considered to have commenced. This date has particular significance under the regulatory structure for new sources established by the Clean Air Act.

In effect, a "new source" under the definitional provisions of the Clean Air Act is a source the construction of which is commenced after the date of proposal by EPA of pertinent standards of performance. See Section 111(a)(2) of the Act, 42 U.S.C. §7411(a)(2). EPA published proposed standards for fossil-fuel fired steam generating units on August 17, 1971. See 36 *Fed. Reg.* 15,704. PPG established the design and carried out the engineering work on the system in 1970. (App. 59.). It entered into contracts for the two gas turbines and the turbogenerator in November 1970. (App. 60.) The specification book for the entire power plant was completed in February 1971.*(Id.)* PPG cleared and prepared the site for the system in 1970 and early 1971. The final purchase order for the waste-heat boilers was, however, dated October 14, 1974 (App. 34), after the effective date of the new source standards.

EPA's standards for fossil-fuel fired steam generating units do not refer to cogeneration systems in which waste-heat boilers obtain a substantial part of their heat input from the exhaust of a coordinated turbine, to take the place of heat derived from combustion of fuel. The Agency developed the standards without considering such cogeneration systems, and thus it did not address any of the technological air-emission control

problems arising in connection with the systems.[9] PPG consequently and understandably did not consider or even suspect that the new source standards applied to its facility. When in early 1976, EPA raised the issue of the applicability of the new source standards to the waste-heat boiler components of the system, PPG among other things again pointed out that no one part of the system could be considered independently from the other parts. When construction had begun in 1970 on the gas turbines and the turbogenerator, PPG had then committed itself to construct the mid-component waste-heat boilers on the basis of the integral design and engineering plan also established in 1970. This design and engineering plan was reflected in the orders for the gas turbines and steam turbogenerator in 1970, and it is reflected in the completed system. EPA refused on legal grounds to consider the fact that the waste-heat boilers by design could not practicably function except as part of the total unit. In a letter dated December 22, 1976, an official of EPA's Region VI responded that:

> [e]ven though you [PPG] may have ordered equipment before the date of the proposed regulations that would be completely useless

[9]Only now is the Agency doing so. At 44 *Fed. Reg.* 37,632 (June 28, 1979), EPA published an Advance Notice of Proposed Rulemaking stating its intent to develop proposed new source standards of performance for air pollutants from fossil-fuel fired industrial (non-utility) steam generators. To further its work on developing proposed new source standards for industrial boilers, the Agency requested comments and information on six separate issues, one of which bears specifically on cogeneration systems:

> d. Will enforcement of standards at cogeneration facilities present special problems which should be considered? (*Id.*)

without the steam generators, that action is irrelevant to determine the applicability of the regulations to the two steam generators. (App. 51.)

The "useless" equipment would have been the entire steam turbogenerator.[10]

Thereafter, on April 13, 1977, PPG filed a formal request under 40 C.F.R. §60.5[11] for a determination by EPA respecting the applicability of the new source standards to its facility.

2. EPA advised PPG that the waste-heat boilers would not be subject to the new source standards when operated as designed, but then retracted this determination and imposed on PPG fuel requirements not authorized by the standards.

EPA's Region VI responded on June 8, 1977, to PPG's request for a formal determination, after having received guidance from the Division of Stationary Source Enforcement at EPA's headquarters in Washington. The Agency determined that the waste-heat boilers were subject to the standards because they were capable of operating without waste heat input at the necessary

[10]This unit is a large 44,000 KVA-rated generator. (App. 28.) As PPG reported to EPA in 1976:

> The purchase of the gas turbines and turbogenerators in 1970 represents a commitment of $9.4 million, covering two-thirds of the equipment purchased in the combined-cycle power plant. (App. 46.)

[11]This regulation provides that an owner or operator may request such a determination, and it provides that EPA will respond within 30 days. (See Petition at 4; 587 F.2d at 241 n.3, Petition App. 8a n.3.)

level (250 million British thermal units per hour) for coverage. (Petition, Appendix F, at 31a-33a.) The Agency's response stated that the waste-heat boilers were subject to performance tests while being operated with 100 percent fossil-fuel input; it did not resolve the question of what was to happen when the boilers were operated as designed with waste heat. PPG requested a clarification. (App. 91.)

On August 3, 1977, the Director of the Division of Stationary Source Enforcement at EPA's headquarters by letter stated that the standards would apply only during a performance test or other periods when a boiler was operating entirely using fossil fuel. (Appendix A *infra*, at 1a.)

This favorable ruling was soon rescinded, however. On August 18, 1977, the Director by letter retracted the prior ruling and stated that the waste-heat boilers would be subject to *certain selected provisions* of the standards at all times. (Petition, Appendix G, at 34a-36a.) He also determined that PPG's waste-heat boilers would be required at all times to burn fuel which contained a sulfur content equal to or less than a sulfur level to be specified as a result of performance tests conducted in compliance with the standards. He stated that PPG was not required to install equipment for and to conduct the continuous monitoring for SO_2, NO_x, or CO mandated by the standards. However, PPG would be required to install and operate continuous opacity monitors in the stacks of the waste-heat boilers, and PPG may also be required to monitor and report on the sulfur content of supplemental fossil fuel burned in the boilers.

In effect, EPA had established a new *ad hoc* standard

for application to PPG's unique waste-heat boilers. Notably, the standards themselves do not prescribe fuel requirements, nor do they authorize EPA officials to establish such requirements in particular cases.

PPG sought judicial review. It was especially concerned that reliable and economic fuel sources be available for use with the cogeneration system.[12]

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[12]PPG's concerns were not unfounded. See Tinker, *Exxon Can't Meet Low Sulfur Residual Demand*, The Oil Daily, February 23, 1979, at 1, col. 1 (blaming the problem of insufficient supplies of low sulfur fuel oil "on a shortfall of sweet, low sulfur crude oil" such as that previously obtained from Iran).

The task of obtaining suitable supplies of environmentally acceptable fuel rests with Conoco Inc., a co-respondent here and the intervenor in the case in the court of appeals. By contract amendment between Conoco and PPG, dated July 9, 1974, Conoco obligated itself to supply fuel for use in PPG's Lake Charles Works. EPA's determinations to apply the standards has resulted in the notification by PPG to Conoco that PPG claims Conoco is contractually obligated to deliver to PPG fuels having a sulfur content of seven-tenths percent (0.7%) or less. See Complaint, ¶8, in *PPG Industries, Inc. v. Costle*, Civ. Action No. 77-1271 (W.D. La., filed November 11, 1977).

During the pendency of this litigation, PPG has complied with the standards largely by using natural gas as the supplemental fuel for the waste-heat boilers. As prescribed by the standards, performance tests with natural gas were carried out on the first waste-heat boiler on August 24, 1977 (App. 97), and on the second waste-heat boiler on May 3, 1979. Letter from James E. Wyche, III to Diane Dutton, Director, Enforcement Division, EPA Region VI (June 21, 1979).(The second performance test was delayed because of a disagreement between EPA and PPG arising out of the litigation.) In each such test, the boilers met the requirements established by the standards and EPA's ruling of August 18, 1977.

REASONS FOR DENYING THE PETITION

A. If EPA's Determinations Were Made Prior To August 7, 1977, The Date Of Enactment Of The Clean Air Act Amendments Of 1977, EPA's Jurisdictional Arguments Have No Basis In Fact

Throughout this litigation, PPG has taken the position that EPA's determinations regarding the waste-heat boilers were found in three letters: the letter of June 8, 1977 from an official of EPA's Region VI office (Petition, Appendix F, at 31a), the letter of August 3, 1977 from the Director of the Division of Stationary Source Enforcement at EPA's headquarters (Appendix A *infra*, at 1a), and the letter of August 18, 1977 also from the Director (Petition, Appendix G, at 34a.). For example, the fuel restrictions first appear (they are not set out in the standards) in the letter of August 18, 1977.

The Clean Air Act Amendments were enacted on August 7, 1977. See Pub. L. No. 95-95, 91 Stat. 685 (August 7, 1977). These 1977 Amendments revised Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7607(b)(1), to add the statutory language upon which EPA relies for its jurisdictional arguments. Prior to the 1977 Amendments, it was beyond dispute that a final action by EPA such as the one in the present case was subject to review in an action brought in a United States District Court under 28 U.S.C. §1331 (the federal question statute) and 5 U.S.C. §§701-706 (the Administrative Procedure Act). See *Utah Power & Light Co. v. Environmental Protection Agency*, 180 U.S. App. D.C. 70, 553 F.2d 215 (1977).

In its petition, EPA avers that its determinations were made in the letter dated June 8, 1977 from an official of the Agency's Region VI office. (See Petition, at 4.) The letter of August 18, 1977, from a Division Director at EPA's Washington headquarters is characterized as a "clarifi[cation]." (*Id.* at 5.) Perhaps understandably, the petition disregards the substantively contrary letter dated August 3, 1977 from the Division Director.

If the characterizations in the petition for the Agency are proper, then EPA's determinations were in fact made prior to enactment of the 1977 Amendments. In these circumstances, the revisions made by the 1977 Amendments to the judicial review provisions arguably would not apply in this case even if EPA's arguments on jurisdiction were correct and the decision of the court of appeals were wrong.

B. No Conflict Exists Among The Relevant Decisions Of The Courts Of Appeals; The Courts Have Harmonized Their Jurisdictional Rulings On Amended Section 307(b)(1) To Provide A Framework For A Reasoned, Practical Construction Of These New Portions Of The Clean Air Act

In the petition, EPA avers that approximately 90 currently pending actions depend on the jurisdictional question decided by the court of appeals in this case. (Petition, at 13 n.8.) EPA claims that "serious problems" with the administration of the Clean Air Act are created because of the decision by the court of

appeals. (*Id.* at 13.)[13] Thus far at least, the courts of appeals have not had so much difficulty as EPA claims. Indeed, the three decisions by courts of appeals reported to date bearing on the jurisdictional issue are in harmony with each other and provide a workable starting point for a reasoned, practical construction of the recently amended judicial-review portions of the Clean Air Act.

Under the judicial-review provision of the Clean Air Act, Section 307(b)(1), as amended, 42 U.S.C. §7607(b)(1), a court of appeals has exclusive jurisdiction to review any order issued by the Administrator of EPA under several specifically enumerated sections, or "any other final action of the

[13]No trouble even arguably arose under the Act as it stood prior to the 1977 Amendments. Then, under *Utah Power & Light Co. v. Environmental Protection Agency*, 180 U.S. App. D.C. 70, 553 F.2d 215 (1977), the district courts clearly had jurisdiction to review action by EPA applying regulations to particular facilities. See *supra*, at 13. EPA, however, argues that the 1977 Amendments changed the jurisdictional import of the judicial review provisions in the Act. It is thus EPA's jurisdictional argument, not the position of PPG or Conoco, which creates any difficulty.

In fact, EPA has ensured that regulated parties will be presented with a difficult jurisdictional decision regarding the forum for review. In notices recently published by EPA in the *Federal Register* reporting that the Agency had granted or denied a permit to construct a particular new facility, EPA has included an explicit statement that review of its action to grant or deny the requested permit must be had in the appropriate court of appeals. See, *e.g.*, 44 *Fed. Reg.* 41,531 (July 17, 1979) (giving notice that EPA had granted a "PSD" permit to FlexCon Company for construction of a new "pressure-sensitive adhesive coater with a gas-fired incinerator").

Administrator" under the Act which is locally or regionally applicable. Because the action in this case involved the interpretation and application of a regulation, it did not fall within any of the specifically enumerated sections of the statute.[14] Therefore, in order for the court of appeals to have jurisdiction, EPA's action had to come within the "any other final action" clause of the statute.

The court of appeals attempted to determine what type of action was within the "any other final action" language of the statute by reference to the legislative history of the 1977 Amendments. However, the legislative history spoke only of *venue* for review, not jurisdiction. See 587 F.2d at 243 n.6, Petition App. 15a-16a n.6. As the court of appeals observed, the legislative history "complete[ly] fail[s] to mention what EPA asserts was a massive shift in jurisdiction to the courts of appeals." *Id.* at 243, Petition App. 15a.

[14]Notably also, the action was not taken by the Administrator of EPA which the statutory provisions require as a predicate for review actions to be brought jurisdictionally in the courts of appeals. EPA's actions were taken by an official of EPA's Region VI office and by the Director of the Division of Stationary Source Enforcement at EPA's headquarters.

EPA's regulations (40 C.F.R. §60.5) provide that determinations regarding applicability of new source standards are to be made by the Administrator. This is so even though the regulations also specify that "[a]ll . . . applications, submittals, and other communications to the Administrator pursuant to this part shall be . . . addressed to the appropriate Regional Office of the Environmental Protection Agency, to the attention of the Director, Enforcement Division [of the Region]." (40 C.F.R. §60.4.)

Section 301(a)(1) of the Clean Air Act, as amended, 42 U.S.C. §7601(a)(1), permits the Administrator to delegate his "powers and duties" other than rulemaking authority.

The court accordingly turned to other aids to statutory construction. It concluded that the amended statutory provisions must be read in light of the limitations in the ability of a court of appeals to develop facts. In the court's view the determination regarding jurisdiction should reflect the capability provided a district court to call into play discovery procedures to prove out a more comprehensible administrative record.

As previously noted, EPA's interpretation and application of its regulation in the present case produced a record that consisted of a collection of correspondence between the Agency and the petitioner. The court of appeals found that this record was "sparse" and might leave the reviewing court in a position where it would be unable to verify, or even identify, the EPA's grounds for its decision. 587 F.2d at 244–245, Petition App. 19a. Because the appellate courts lack the fact finding mechanisms available to district courts, they are ill-suited to conduct a meaningful review of administrative action resting on records that are either sparse or non-existent.[15] Therefore, the

[15]The court of appeals also feared that courts of appeals would not be able to provide prompt review, and suggested that delayed review would be costly and prejudicial to the parties:

> At this level [the court of appeals], only after hearing, which may be long delayed because of other calendar commitments, can it be known whether the record is sufficient for review purposes. An insufficient record may necessitate a removal for fact-finding and record completion and a second court appearance, often before other judges, long delayed. 587 F.2d at 245; Petition App. 20a.

Moreover, as the court of appeals had stated in a prior decision, "[r]emand to the agency for a statement of reasons for its decision would risk after the fact rationalization, which the evidence gathering powers of a trial court can more easily penetrate." *Save the Bay, Inc. v. Administrator of Environmental Protection Agency*, 556 F.2d 1282, 1292 (5th Cir. 1977).

court of appeals held that the "any other final action" clause in the statute would not include any final action taken on such an informal basis that it produced an administrative record insufficient for a court of appeals to review. Such informal actions should be reviewed at the district court level to permit the record to be proven by way of discovery and other means. *Id.*, Petition App. 20a-21a.

Other courts of appeals have accepted this ruling. In *United States Steel Corp. v. Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979), the petitioners filed for review of EPA's action in promulgating regulations designating areas in Alabama as nonattainment areas for suspended particulates. The court found that it had jurisdiction under 42 U.S.C. §7607(b)(1) to review the agency action. *Id.* at 212. It distinguished this decision from its prior decision in the *PPG* case on the basis of the type of agency action taken and the resulting administrative records involved in each case. The court noted that the record in the *PPG* case consisted solely of exchanges of correspondence.

Since there was a substantial record in the *U.S. Steel* case, derived from a rulemaking proceeding, the court found that the considerations that gave rise to the result in the *PPG* case were absent. The court explicitly acknowledged the difference in the nature of the two actions. In the *PPG* case EPA had determined that a certain regulation was applicable to a specific plant, while in the *U.S. Steel* case EPA had promulgated regulations having a general effect in the specified areas.

Similarly, in *Sharon Steel Corp. v. Environmental Protection Agency*, 597 F.2d 377 (3d Cir. 1979), steel-company petitioners sought review of a final rule issued by EPA embodying the determination that four

areas of Pennsylvania were nonattainment areas for suspended particulates.

The court briefly discussed the jurisdictional issue, and in doing so, distinguished the case before it from the Fifth Circuit's prior decision in the *PPG* case on grounds similar to those set out in the Fifth Circuit's *U.S. Steel* decision. See 597 F.2d at 379 n.3. The court took the position that the *PPG* case was not applicable in the case before it because EPA had in its case taken rulemaking action under 5 U.S.C. §553. The court opined that the *PPG* case stood for the proposition that 42 U.S.C. §7607 did not give jurisdiction to courts of appeals to review the interpretation and application of regulations, where the Agency was acting on an informal basis. *Id.*

Consequently, in the three cases reported to date interpreting the "other final action clause" of Section 307(b)(1), the courts have reached decisions which are not in conflict and which provide a reasoned and practical conceptual basis for deciding which of the many types of "other actions" are properly to be reviewed in courts of appeals and which are to be reviewed in district courts. If an action taken by EPA was based upon the record provided by a formal adjudicatory proceeding or by a rulemaking proceeding, then the action must be reviewed in the courts of appeals. If the action reflects informal adjudicatory proceedings, then district courts must undertake the task of review. This is precisely the result advocated as a general matter by two distinguished commentators. See Currie and Goodman, *Judicial Review Of Federal Administrative Action: Quest For The Optimum Forum*, 75 Colum. L. Rev. 1, 54-61 (1975).

EPA's petition offers several reasons for reaching a result contrary to that of the court of appeals. Among other things, it asserts that this is a case of "undisputed facts." (Petition, at 8.) This assertion is not correct. The facts regarding the cogeneration system were not fully developed in the exchanges of correspondence, in large part because EPA rejected the legal relevance of much information. For example, EPA did not concern itself with the integrated design of the cogeneration system or with the orders for and construction of the gas turbines and the steam turbogenerator. The Agency explicitly took the position it would not consider these matters even if equipment such as the steam turbogenerator would be "useless" in the absence of the waste-heat boilers. See *supra,* at 9-10.

Yet the Agency recognized the special characteristics of the cogeneration system in rewriting on an *ad hoc* basis the new source standards. It imposed fuel requirements not found in the standards and otherwise selectively chose among the requirements of the standards, as evidenced by the letter of August 18, 1977. No basis or rationale for these *ad hoc* determinations appears in the 97 pages of correspondence making up the administrative record certified to the court of appeals by the Agency in this case.

Document discovery and interrogatories would force disclosure by the Agency of whether it indeed had any basis for its *ad hoc* action, and if it had such a basis, whether the basis was sustainable on the record.

EPA's petition focuses particularly on discovery procedures. (See Petition, at 11-12.) Contrary to EPA's claims, the court of appeals did not direct or invite the district court "to go far beyond the administrative

record and to create a judicial record much broader than the administrative proceedings." (*Id.* at 11 (footnote omitted).) The discovery proceedings which have taken place in the district court since the decision by the court of appeals have been clearly and sharply addressed to proving out the full administrative record before the Agency at the time the determinations were made. That is, the discovery has sought disclosure of materials and information before EPA at that time, along with the bases upon which those who made the decisions acted. It is on these grounds that the district court on May 22, 1979, denied EPA's Motion for A Protective Order barring all further discovery. The district court on June 6, 1979, directed EPA to answer certain interrogatories previously served on the Agency by intervenor Conoco, Inc. EPA has since responded to those interrogatories. This course of events is consistent with this Court's opinions in *Camp v. Pitts,* 411 U.S. 138, 143 (1973), and *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 (1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES F. LETTOW
JANET L. WELLER
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

V. PETER WYNNE, JR.
One Gateway Center
Pittsburgh, Pennsylvania 15222

OLIVER P. STOCKWELL
One Lakeside Plaza
Lake Charles, Louisiana 70601

Counsel For Respondent
PPG Industries, Inc.

Of Counsel:

CLEARY, GOTTLIEB, STEEN &
HAMILTON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

STOCKWELL, SIEVERT, VICCELLIO,
CLEMENTS & SHADDOCK
One Lakeside Plaza
Lake Charles, Louisiana 70601

July 30, 1979

APPENDIX A

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
Washington, D.C. 20450

August 3, 1977
Office of Enforcement

Charles F. Lettow, Esq.
Cleary, Gottlieb, Steen and Hamilton
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Dear Mr. Lettow:

Your letter of July 18, 1977, requests confirmation of your understanding of EPA's requirements regarding the applicability of new source performance standards for fossil-fuel fired boilers (40 CFR §60.40 *et. seq.*) to the operation of PPG's Lake Charles, Louisiana waste-heat boilers.

This letter is to confirm your understanding: (1) that except for the time of the performance test or other periods when a boiler is operating on 100 percent fossil fuel, the standards for fossil-fuel fired boilers would not apply to the operation of PPG's waste-heat boilers in their planned mode of operation (significant heat input from turbine exhaust gas); and (2) that any new source performance standard for waste-heat boilers which would be proposed and promulgated in the future would not apply to PPG s Lake Charles, Louisiana

waste-heat boilers which commenced construction prior to the proposal date of the new standard.

If you have any questions on this matter, please contact Doug Farnsworth of my staff at (202) 755-2570.

Sincerely yours,

/s/ Edward E. Reich,
Edward E. Reich, Director
Division of Stationary Source
Enforcement (EN-341)